

**R & W Landscape & Property Management, Inc.
and Service Employees International Union,
Local 254, AFL-CIO. Case 1-CA-33488**

August 18, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

On April 11, 1997, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, R & W Landscape & Property Management, Inc., Wilmington, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²For institutional reasons, Member Higgins agrees to apply the precedent of *Management Training Corp.*, 317 NLRB 1355 (1995). In this regard, he notes that a Board majority has adopted and consistently applied the principles of that case.

Karen Hickey, Esq., for the General Counsel.
Geoffrey P. Wermuth, Esq. (Murphy, Hesse, Toomey & LeHane), of Quincy, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Boston, Massachusetts, on June 17-18 and July 29-30, 1996. The charge was filed on October 17, 1995,¹ and the complaint issued on February 29, 1996.

At issue is whether Respondent engaged in threats, interrogations, and surveillance of union members in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) and whether it discharged two employees (Richard and Victor Pena) in violation of Section 8(a)(3) of the Act.

¹All dates are in 1995 unless otherwise indicated.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, provides cleaning and landscaping services at various stations of the Massachusetts Bay Transportation Authority in the metropolitan Boston area under contract with the MBTA. It annually provides services valued in excess of \$50,000 directly to the MBTA. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

A threshold issue is Respondent's contention, raised in its answer and pursued on brief, that the complaint should be dismissed under *Res-Care, Inc.*, 280 NLRB 670 (1986), because MBTA's exemption under the Act as a "public employer" extends to Respondent. The motion is denied. The pertinent rationale of *Res-Care* was expressly overruled in *Management Training Corp.*, 317 NLRB 1355 (1995), aff'd. sub nom. *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997). Accordingly, jurisdiction is no longer determined on the basis of whether an employer or governmental entity controls most of the "terms and conditions of employment." Instead, the relevant considerations are whether a Respondent contracting with an exempt governmental entity meets the definition of "Employer" in Section 2(2) of the Act and the applicable monetary standard. In this case, both matters are admitted.

II. BACKGROUND

Prior to privatization of station cleaning operations, all hourly MBTA employees, including cleaners, were represented by the Amalgamated Transit Union, Local 589, the "Carmens' Local." Thereafter, the job of cleaning particular stations was parceled out among a number of contractors, and the employees of all but two of these came to be represented by SEIU Local 254, the Charging Union. Respondent R&W is one of the two and its employee-cleaners (about 45 in number, at pertinent times herein) were not represented by any union.

During the summer of 1995, the two locals vied with each other in seeking to represent R&W cleaners.

In March, Richard Pena was hired by R&W to work weekdays as a cleaner at the MBTA station in Braintree. He had worked for several years at the "Jackson Square" station for another cleaning contractor, and during that time MBTA's superintendent of subway services (Jerry Romano) came to know and call him by name. Victor Pena was hired by R&W in June for weekend work at the Braintree and Quincy-Adams stations.³ Richard continued to work part

²Respondent's unopposed motion to correct the transcript involves errata and is granted.

³Richard and Victor Pena were born in the Dominican Republic. They are not related to each other by blood or otherwise. Although they have some knowledge of the English language, they normally

time and Victor full time for another company (Janitronics) whose employees were represented by SEIU; and both Penas were members of that union when they began working for R&W.

German Sanchez was the immediate supervisor of both Richard and Victor. Another supervisor (Fernando Rodriguez) also had authority over them. Sanchez and Rodriguez, in turn, reported to R&W President Edward McNabb. McNabb also was executive director of the Woburn Housing Authority (WHA), a quasi-public entity in Massachusetts. McNabb makes final hiring and firing decisions for R&W, and Sanchez and Rodriguez at times have made recommendations in this regard.

Neither of the Penas had any record of disciplinary problems at R&W, and McNabb and their supervisors consider them to have performed well as cleaners.

On July 17, Richard signed a union authorization card for SEIU and on a break later that day he and a cleaner responsible on weekdays for the Quincy-Adams station (Raphael Guerrero, brother-in-law of Sanchez) shared that they had each signed cards for that union. On the following day, Sanchez told Richard he should not have signed,⁴ adding that the "boss" said those who did so would be fired "one by one;" and he asked Richard to write a letter stating that he had signed the card by mistake. Richard told him he would think about it. Sanchez pursued the matter each day for about a week until Richard finally said he would write the letter, but he never did.

Victor signed an SEIU card on July 18. Shortly thereafter and apparently then unaware of that he had signed, Sanchez told him "they" did not want SEIU and that he should not sign with that union. Dissembling, Victor said he had not done so as an R&W employee but had become a member of SEIU in order to retain his full-time job at Janitronics.

Around this time, Victor went to a SEIU representative and complained about being given two separate paychecks each week for work he had done for R&W. One check, for half his hours, was issued by R&W. The other covered the remaining hours, was issued by Telluride Contracting Corporation, and was signed "Susan McNabb, Pres." by McNabb's wife. On investigating, the SEIU business agent and general organizer (Donald Coleman) concluded that Victor and two other R&W cleaners had received an hourly wage cut from about \$10 per hour to \$7.95 at the same time they started to receive two paychecks for their weeks' work. Coleman viewed this as violative of the prevailing wage rate mandated by the MBTA in its contracts with cleaning contractors.

During the afternoon of August 3, a field representative of SEIU, claiming majority representation, presented a number of signed authorization cards to McNabb (including those of Richard and Victor) and asked for voluntary recognition.

speaking Spanish, did so in testifying, and the services of an official translator were required.

⁴ Sanchez claims he inquired as to "whether" Richard had signed a card because someone told him SEIU people were telling employees that he (Sanchez) wanted them to do so and that he merely wanted to dispel that impression. Assertedly, Richard replied that he was not going to sign because he already belonged to the SEIU by virtue of his second job at Janitronics. Later in his testimony (Tr. 327) Sanchez claims he did not ask Richard if he had signed but simply told him "I didn't send anyone to go sign a paper."

McNabb, aware that the same claim and demand was being made by the Carmens' union, made no response.

Later in the afternoon Guerrero conveyed a message to Richard Pena that Supervisor Rodriguez wanted to see both of them at the "Green Street" station early on the following morning; and that evening McNabb received a call at his home from SEIU Business Agent Coleman. Aware that McNabb had balked at according prompt recognition, Coleman told him he knew what was going on and would not let him "get away with it."⁵ Among other things he mentioned the dual check situation and use of WHA vehicles in servicing cleaning contracts at MBTA stations.

On the morning of August 4, Richard Pena and Guerrero met Rodriguez at the Green Street station. He handed each of them a Carmens' union authorization card and told them to sign it, adding that "the owner didn't want to know about the 254, and he was going to choose this one, the Carmens' union." They signed and turned the cards over to Rodriguez.⁶

In mid-August, SEIU filed charges with the Board alleging that R&W had provided and Local 589 had accepted unlawful assistance in the organizing campaign.⁷

Also in mid-August, Coleman called John Alywood, assistant deputy director of labor relations at the MBTA, and reported his suspicions about the dual pay situation. He followed this up with a letter to Alywood on August 29 captioned "Wage Fraud by R&W Landscape Co.," in which he listed the names of three employees (including Victor Pena) who had complained to SEIU, mentioned that two of them (Ortiz and Laboy) had been fired in July, and enclosed copies of checks and pay stubs.⁸ He followed this up on September 26 with a two-page "Supporting Memorandum" sent to MBTA's director of labor relations, Frank McDonough.⁹ In January 1996, not having received any substantive response from the MBTA, SEIU filed a suit against R&W in a Massachusetts court on behalf of the three individuals. That matter was pending when the evidentiary record here closed.

⁵ McNabb quotes Coleman as saying: "I'll have your head on a platter."

⁶ Rodriguez' only testimony on this incident came in response to a question: "On August 4, 1995, did you tell Richard Pena to sign a card for Local 589 of the Carmens' union?" He answered "No." I have credited Richard, particularly in light of his apparent candor and the truth-enhancing detail in his account.

⁷ No complaint issued and the charges were withdrawn pursuant to an informal "non-admission" Board settlement agreement signed in November. Apparently in deference to the settlement, neither Sanchez' "threat" to Richard Pena on July 18 and his ensuing inquiry to Victor nor Rodriguez' "coercion" of Richard and Guerrero on August 4 are alleged in the instant complaint. Accordingly, those matters are considered only as background to an understanding of the alleged unlawful events occurring on October 10 and 11.

⁸ Although Coleman blacked out Richard's name, McNabb concedes that he knew early in September that Richard was the third complainant.

⁹ McNabb sent two detailed replies to the MBTA, the first was dated August 31 and the second was sent on October 4, in which he emphatically denied payroll fraud or misuse of WHA equipment. In the latter, he accused SEIU of twisting the truth and being willing to do "anything to discredit me and my firm."

III. ALLEGED UNLAWFUL CONDUCT ON OCTOBER 10
AND 11

When Victor Pena arrived for work at the Quincy-Adams station on the morning of October 7 (Saturday), he found in the cleaners' closet a handprinted note in Spanish which reads as follows:

VICTOR PENA

PLEASE. I WANT [YOU] TO DO THE BATHROOMS IN BRAINTREE AND QUINCY-ADAMS, AND IN BRAINTREE, TO PICK UP THE GARBAGE THAT ACCUMULATES IN FRONT OF WHERE THE TAXI STAND IS, BECAUSE THE TAXI DRIVERS HAVE PUT IN A COMPLAINT THAT THEY HAD TWO FLAT TIRES DUE TO BROKEN BOTTLES, THAT RICHARD FOUND IT [SO] ON MONDAY MORNING, AND YOU DON'T EVEN USE THE MOPS, THAT THEY REMAIN DRY . . . I WANT TO FIND ALL OF THEM [THE BATHROOMS] MONDAY MORNING VERY CLEAN, AND ONE PAYS YOU 30 HOURS. IF YOU DON'T WANT TO WORK, JUST TELL US SO THAT WE CAN FIND ANOTHER PERSON TO TAKE THIS PIECE OF CAKE.

GERMAN SANCHEZ

Greatly disturbed, Victor promptly called Sanchez at home and chided him for leaving a note rather than speaking to him about complaints. Sanchez expressed surprise and, after Victor read the note, denied any knowledge of it. They then focused on possible authors and concluded that it was probably done by Guerrero and/or Richard Pena who, respectively, were the weekday cleaners at the Quincy-Adams and Braintree stations. Aware that Victor was "upset," Sanchez told him he would speak with Rodriguez and arrange a meeting on the following Tuesday.¹⁰ That afternoon Sanchez happened to meet Richard on a neighborhood street. He told him about Victor's concern and asked if he had written the note. When Richard replied, "Guerrero did it,"¹¹ Sanchez, said he would arrange to meet him, Guerrero and Victor on Tuesday at the Braintree station "to fix the problem."¹²

On Sunday afternoon just before leaving work, Victor placed in the same closet an unaddressed note in which he accused the authors of the prior note of doing a "woman-like" thing¹³ and admonished them to tend to their own work; and the note was seen early Monday morning by Guerrero and Richard Pena.¹⁴ Later that day Sanchez briefed McNabb about the situation and the meeting set for the next

day. McNabb told him to bring Rodriguez with him for the "investigation."¹⁵

On Tuesday morning Sanchez asked Rodriguez to drive him and Victor to the Braintree station for a meeting with Richard Pena.¹⁶ Assertedly, he did not mention and Rodriguez did not ask anything about the purpose of the meeting. Sanchez met Rodriguez at about 1 p.m. in Roxbury and they drove for about 10 minutes to Fields Corner (again, assertedly, without mentioning the meeting) where they picked up Victor and drove on to the Braintree station, arriving at about 1:30 p.m.

Rodriguez stopped in the taxi parking area about 25 to 30 feet from the public entrance. Sanchez found Richard standing near the entrance. He was wearing an SEIU hat given him a few days earlier and Sanchez asked, "Who gave you that hat?" He replied, "I got it [from the union] at Janitronics." Sanchez did not pursue the matter, and together they went to the truck.¹⁷ Then the two supervisors and the Penas walked to the end of the busway to a point about 120 feet from the entrance but still on MBTA property. Only Richard wore clothing (an orange "T" shirt) having an MBTA connection. There Rodriguez and Sanchez sat on a ledge and Rodriguez, addressing Victor, said, "Tell Richard why you are mad." The Penas promptly began yelling and, among other things, accused one another of having "bad mothers." A rapid flurry of punches ensued. At that point, Rodriguez "jumped up . . . got in the middle and . . . asked 'what are you guys doing?' . . . [and] they stopped." The whole incident lasted 20 to 30 seconds. Both supervisors state that neither of the Penas had cuts or bruises.¹⁸

On returning to the truck, Rodriguez told the Penas he had to tell McNabb because "maybe someone in the MBTA station had seen them fighting." Neither of the Penas responded. Then Richard asked for 2 hours off on the following day. Sanchez approved on condition that Guerrero agreed to cover for him. Rodriguez interjected: "They are asking for permission to go look for work . . . [they know] what happened to Sammy [Laboy] and Franklin Ortiz for having the big mouth."¹⁹ Leaving Richard standing on the sidewalk, the

¹⁰ Victor understood that the purpose of the meeting was to find out who wrote the note using Sanchez' name. On the other hand, Sanchez disclaims any intent to investigate stating that his purpose in arranging the meeting was simply to let the Penas resolve the problem themselves.

¹¹ At a later point in his testimony, Richard admits he was present when Guerrero wrote the note.

¹² Sanchez claims he said nothing to Richard other than telling him there would be a meeting at Braintree on Tuesday.

¹³ There is ample testimony that expressions of that type, including derogatory "mother" references, are considered fighting words especially when directed to Hispanic males.

¹⁴ Richard interpreted the note as saying that "we [himself and Guerrero] were like little women." I infer that Sanchez, an astute "hands on" supervisor, swiftly became aware of the note and Richard's enraged reaction to it.

¹⁵ McNabb claims that he told Sanchez to bring "someone" and that he learned only later that Sanchez had invited Rodriguez. For his part, Sanchez testified that during the office visit he told McNabb that he had asked Rodriguez to accompany him. Sanchez also initially claimed he asked Rodriguez "because he has a smaller truck . . . convenient for me to get to the [Braintree] station at a time when there's traffic." On cross-examination, however, he conceded that he wanted Rodriguez to be there "as a witness to what would happen."

¹⁶ There is no indication that Guerrero had been asked to be at the meeting.

¹⁷ Even considering the prior history, I find the question innocuous. It was known within the company that Richard had aligned himself with SEIU by signing an authorization card, and the question appears simply rhetorical and indicative of Sanchez' surprise at seeing the hat on him for the first time. Accordingly, the allegation of unlawful interrogation will be dismissed.

¹⁸ Victor claims Richard swung at him and missed and that he did not respond physically. Richard states he merely waived a limp open hand toward Victor without touching him. I find that scenario improbable.

¹⁹ Rodriguez has Victor asking Richard: "Are you going to get free time to go get work, during working hours?" However, he does not deny making the statement (quoted above) attributed to him by Richard and credited by me. On the other hand, I decline to credit

others got into the truck and drove for 15 to 20 minutes to the Milton MBTA station where Victor took the "T" to his weekday job at Janitronics.²⁰

According to McNabb: Rodriguez called him that afternoon shortly after lunch and told him that the Penas had had a "big" fight at the Braintree station. Without asking for details, he told Rodriguez to suspend them until such time as "I figure out what to do." Shortly thereafter he received a phone call from Jerry Romano, MBTA's superintendent of subway services, who told him he knew about the fight and did not want the Penas on MBTA property anymore.²¹

In response to McNabb's request, Romano sent him a letter dated and received on October 11, the pertinent portion of which of which reads as follows:

Fighting is a very serious offense and is not tolerated by Massachusetts Bay Transportation Authority. Therefore I request that the two employees . . . [the Penas] be relieved of duty and are not to work at any of the Massachusetts Bay Transportation stations or facilities in the future.²²

Victor's claim that Rodriguez went on to say "somebody was giving information to the union and I have my own sources of information [as to who it was]." Richard did not corroborate Victor and the statement appears incongruous.

²⁰ Victor also claims that during the ride to the Braintree station Rodriguez questioned him about how long he and Richard worked at Janitronics and whether they were SEIU members. As to the latter inquiry, he gave the same response he had given Sanchez in July—that they had to belong in order to retain jobs at Janitronics. He also claims that Rodriguez asked the same questions again on the ride back to Milton. I am not persuaded that the questions were asked. By that time the answers were well known by management and it appears likely that Rodriguez through contact with Sanchez and otherwise knew of the Penas' membership and that Victor had complained ("bigmouthed") to SEIU about the dual check situation.

²¹ Romano and Rodriguez offered somewhat different versions of postfight event. Romano claims that on October 10 ["I'm guessing it was maybe 10 or 11 o'clock"] an anonymous non-Hispanic male called and told him a cleaner at the Braintree station had just participated in a fight, that right after the caller hung up he "beeped" Rodriguez, that Rodriguez called back right away, that he told Rodriguez he had received a "complaint" about a fight involving an MBTA cleaner, and that Rodriguez replied that two cleaners—the Penas—were involved. Romano states he at once called McNabb, told him he had spoken with Rodriguez, recounted what Rodriguez had said, requested that both Penas immediately "be removed from MBTA property and dismissed," and agreed to confirm the request in writing. For his part, Rodriguez testified that he responded to Romano's "beep" sometime around 3 p.m., that Romano told him he had received a call about a fight at the Braintree station and asked: "What happened?" Without giving (or being asked for) details, Rodriguez told him Richard and Victor Pena were the participants, Romano assertedly asked, "Who is Victor?" Rodriguez told him he was a cleaner on weekends. After that reply, Romano "hung up immediately." Rodriguez also claims he called McNabb at home "after 5:00 p.m., I think" and informed him that the Penas had fought in Braintree. McNabb assertedly told him to suspend them until he (McNabb) had an opportunity to investigate. According to Rodriguez, no details were asked for or given, and neither he nor McNabb mentioned any earlier conversation with Romano.

²² A few days prior to sending the letter, Romano received a copy of a letter to MBTA dated October 4 in which McNabb vigorously disputed SEIU's dual pay allegations and specifically named Victor Pena as one of the complaining cleaners.

Without further inquiry, McNabb on October 11 sent a certified letter to each of the Penas to which he attached copies of the MBTA letter. McNabb's letter reads pertinent part:

This is to notify you that your services are no longer required.

The reason for this action is necessitated by your behavior on October 10, 1995 where you were observed by R & W personnel in a physical altercation. . . .

Additionally the MBTA has mandated that you not be allowed to resume work on their property.

Romano made no inquiries when he learned in May 1996 that Richard Pena was again working as a cleaner at an MBTA station. When asked about this, he testified: "[I had] No objection, I mean, I wasn't out to hurt anyone."

III. DISCUSSION

I find the Penas' discharge unlawful for two reasons.

Induced misconduct. When an angry Victor Pena called his immediate supervisor (Sanchez) at his home early on a Saturday morning and read the note he had just found in the cleaners' closet at the MBTA's Quincy-Adams station, Sanchez' reaction was not what might reasonably be expected. He was not concerned that someone had signed his name to the note, nor was he interested in finding out whether the claimed cleaning misfeasances had in fact occurred. Admittedly, he never intended to investigate those matters. Instead, he arranged a meeting between Victor, Richard Pena (one of the two likely authors of the note²³) "to let . . . [them] resolve the problem [themselves]," and he asked co-Supervisor Rodriguez to attend "as a witness." And after going out of their way to drive the off-duty Vincent to the MBTA station where Richard was working and bringing them together well away from the main entrance, the two supervisors sat down and watched while the two Penas promptly engaged in flurry of name calling and blows. After about 30 seconds they were disengaged by Rodriguez who shortly thereafter informed owner McNabb of the Penas' "big"²⁴ fight at the station. McNabb ordered their immediate suspension and fired them on the following day.

Why did the supervisors go to this much trouble when they had no intention of making an official investigation as to whether the derelictions cited in the note actually occurred and who put Sanchez' name on it? The answer is not hard to find.

During the preceding summer and continuing through October 10 when the incident at the Braintree station occurred, two unions (SEIU and the Carmens' Local) were vying to represent R&W employees. Owner McNabb was not well disposed toward SEIU because, among other things, it was pursuing with the MBTA a claim that R&W was defrauding employees through a dual paycheck arrangement; and in a letter to MBTA dated October 4, he accused SEIU of twisting the truth and being willing to do "anything to discredit me and my firm."

The supervisors were well aware of McNabb's concern. As found above, Sanchez told Richard Pina that the "boss"

²³ Sanchez chose not to invite the other suspect, his brother-in-law Raphael Guerrero.

²⁴ There is no indication that Rodriguez used the word "big" in describing the incident to McNabb or anyone else.

said he would fire employees who signed SEIU authorization cards "one by one" and Rodriguez cautioned Victor Pena that "they" did not want SEIU. Indeed, at a later time Rodriguez coerced Richard and another employee (Guerrero) into signing cards for the Carmens' Local. Also, there is ample evidence that they knew the Penas were already aligned with SEIU since both had second jobs at Janitronics, a company signatory to a contract with SEIU containing a union-security clause; and Rodriguez knew Victor was one of three R&W employees who had complained to SEIU about the dual check situation. This is apparent from his overheard comment to Sanchez just after the October 10 incident: "They [the Penas] are asking for permission to go look for work . . . [they know] what happened to Sammy [Laboy] and Franklin Ortiz for having the big mouth."

In view of the above, I am persuaded that Sanchez saw in Victor's angry complaint about the note an opportunity to rid the company of two SEIU supporters by facilitating a dischargeable offense, i.e., a fight between the Penas on MBTA property. To that end he obtained their assent to a meeting "to fix the problem" (thereby effectively deterring them from prematurely venting their anger off MBTA property), arranged to drive Victor to the MBTA station where Richard was at work, had Rodriguez there "as a witness" and, after inviting the Penas to confront each other, sat down to observe a predictable result.

I conclude that by those actions the supervisors reasonably expected and knowingly induced a violation of the "no fighting" rule for which the Penas were summarily discharged and that they did so for an unlawful purpose, i.e., because of the Penas' protected activity in supporting a union. Accordingly, the rule violation may not be used as a justification for what otherwise would be discriminatorily imposed discipline.²⁵

The circumstance that the Penas were discharged not by the supervisors but by Owner McNabb does not alter the situation because I am persuaded that they proceeded with his full knowledge and approval. Through Sanchez, McNabb had prior knowledge of the potentially volatile dispute between the Penas, and it was at his direction that Sanchez brought Rodriguez to the prearranged "investigation" as a "witness."

Pretext. The "big" fight for which McNabb's claims to have discharge the Penas is wholly uncorroborated in this proceeding. Indeed, Supervisor Rodriguez testified that when he called and told McNabb they had fought, no details were asked for or given; and McNabb admittedly did not conduct any investigation. In fact the incident occurred well removed from the public entrance of the MBTA station and during the nonpeak (midday) period; and the supervisor "witnesses" both testified that the entire "fight" was over in 20 to 30 seconds and produced no visible injury to the participants or anyone else.

Further, McNabb's precipitous action in discharging the Penas is a departure from past company practice in disciplinary cases. Typically, he investigated complaints about employees and invited recommendations from Sanchez and

Rodriguez; and discipline was administered on a progressive basis.²⁶ Omission of that pattern here assertedly was due to the written request of MBTA official Romano "that the two employees be relieved of duty and are not to work at any of the Massachusetts Bay Transportation stations or facilities in the future." That statement, however, admittedly was solicited by McNabb and I am persuaded that Romano wrote it simply to accommodate McNabb.²⁷ In that regard, Romano is shown to have had even less information than McNabb as to what happened at the Braintree station and the bona fides of his claim that the incident warranted permanent removal of participants from MBTA property is compromised by the fact that he took no action on learning that Richard Pena was again working as a cleaner at an MBTA station for another contractor.

In these circumstances, having in mind that the Penas had no prior disciplinary actions taken against them and are conceded to have performed well as cleaners, I reject as pretextual the reason given for their discharges and find the real reason was McNabb's desire to weaken the representational claims of an unfavored union (SEIU) by terminating two of its known supporters.

CONCLUSIONS OF LAW

1. For the reasons stated above, Respondent R&W violated Section 8(a)(1) and (3) of the Act in discharging Richard and Victor Pena.

2. In the context in which it was uttered, the comment of Respondent's supervisor on October 10 ("[The Penas] . . . [know] what happened to Sammy [Laboy] and Franklin Ortiz for having the big mouth") is a veiled threat that employees would be discharged for engaging in protected concerted activities (such as reporting perceived irregularities in wage payments to union representatives) in violation of Section 8(a)(1).²⁸

3. Those violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Among other things, it must offer the unlawfully discharged employees reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as

²⁵ The situation is akin to "provoked" misconduct found in *Cat-erpillar Inc.*, 322 NLRB 674 (1996), and condonation found in *Virginia Mfg. Coleman*, 310 NLRB 1261 (1993). Compare *Douglas & Lomason Co.*, 304 NLRB 322, 325-327 (1991).

²⁶ R & W distributes a copy of Personnel Work/Behavior Rules to each new hire. The Rules delineate a system of discipline commencing with verbal warnings and proceeding to written warnings followed by suspensions and terminations. Fighting is not included in a listing of offenses for which termination is warranted.

²⁷ McNabb had never before sought a written directive from anyone prior to terminating employees and Romano had never before sent one.

²⁸ In its brief, the General Counsel moves to amend the complaint to include this as an unlawful threat allegation; and Respondent opposes the motion. Respondent had adequate opportunity to, and did, respond to the adverse testimony. The motion is granted.

computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent, R & W Landscape & Property Management, Inc., Wilmington, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Service Employees International Union, Local 254, AFL-CIO or any other union.

(b) Threatening to discharge or otherwise discipline employees because they engage in protected concerted activities, such as reporting perceived irregularities in wage payments to Service Employees International Union, Local 254, AFL-CIO or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Richard Pena and Victor Pena full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Richard Pena and Victor Pena whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, post at its offices in Wilmington, Massachusetts, copies of the attached notice marked "Appendix."³⁰ Copies of the notice, in both English and Spanish, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 1995.

(f) Within 21 days from the date of this Order, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Service Employees International Union, Local 254, AFL-CIO or any other union.

WE WILL NOT threaten to discharge or otherwise discipline you because you engage in protected concerted activities, such as reporting perceived irregularities in wage payments to Service Employees International Union, Local 254, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Richard Pena and Victor Pena full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Richard Pena and Victor Pena whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Richard Pena and Victor Pena, and WE WILL, within 3 days thereafter, notify each of them in writing that

this has been done and that the discharges will not be used against them in any way.

R & W LANDSCAPE & PROPERTY MANAGEMENT, INC.